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NO.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, ET AL.,

PETITIONERS,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED:

1. Are foreign banks permitted to advertise, promote, offer and sell their deposit instruments in the United States as attractive investments without complying with the registration and disclosure requirements of the Securities Act of 1933?

2. Do principles of international law require the payment of full compensation for a sovereign state's elimination by decree of the bank deposits of an alien?

3. Shall the federal judiciary be permitted to continue ignoring the plain language of the Foreign Assistance Act that principles of international law require the payment of full compensation for a foreign state's repudiation of contracts or nullification of agreements with a United States citizen?

PARTIES TO THE PROCEEDING

PETITIONERS:

George M. Davies
June H. Davies
Anthony J. Greco
Evelyn A. Greco
Norman D. Hughey
Donald S. Logan
Etta A. Logan
Attilio D. Rattaro
Ruth Rattaro
Vivian Serrano
Harvey Suddy
Leroy Swanson
Margaret Swanson
Adrienne S. Thompson
Philip B. Thompson
Roberto Vega
Jack West
George W. Williams
John S. Williams
(and all others similarly situated)

RESPONDENTS:

Banco Nacional de Mexico, S.A.
Bancomer, S.N.C.
Multibanco Comermex, S.A.
(each is an instrumentality of Mexico)

TABLE OF CONTENTS

	page:
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	vi
Opinions Below	x
Jurisdiction	x
Statutory Provisions	xi
Statement of the Case	1
Argument:	
The Ninth Circuit has decided a federal question of international importance in a manner contrary to the plain language and obvious purposes of the Securities Act of 1933.	4
As the single agency created and entrusted by Congress to administer	

the federal securities laws, the Securities and Exchange Commission long ago determined that the deposit instruments of Mexican banks were securities within the meaning of the Act. 8

In no way does Marine Bank v. Weaver support the decision below; its holding is inapposite. 11

Principles held determinitive by this Court establish that any instrument, taking traditional forms or not, when offered to the general public as an attractive investment and not specifically exempt, is a security for purposes of the federal securities laws. 15

The domestic marketing and sales of foreign bank deposit instruments through the mails violates the International Banking Act. 16

A sovereign state's elimination by decree of the bank deposits of an alien without payment of full compensation is a taking in violation of international law. 18

Congress has declared that principles of international law require the payment of full compensation for a foreign state's repudiation of contracts or nullification of agreements with a United States citizen. 28

This Court has decided that a foreign state's repudiation of a purely commercial obligation is neither an immune act of state nor subject to a claim of sovereign immunity; it is therefore compensable. 31

Under universally accepted principles of international law, neither the revenue laws nor the exchange control regulations of one foreign state are enforeceable in another. 34

Mexico's exchange control regulations violated the Articles of Agreement of the International Monetary Fund. 35

CONCLUSION 37

APPENDIX -- separately bound and presented pursuant to Rule 21.1(k).

TABLE OF AUTHORITIES

	page:
Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)	31, 32, 34, 38
Allied Bank v. Banco Credito Agricola, 757 F.2d 516 (CA2 1985)	22, 23
Banco Do Rrazil v. Israel Com. Co., 139 N.Y.S.2d 872 (1963)	34
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963)	35
Braka v. Bancomer, 762 F.2d 222 (CA2 1985)	33
Callejo v. Bancomer, S.A., 764 F.2d 1101 (CA5 1985)	32, 33
Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	10
De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (CA5 1985)	33
First National City Bank v. Banco Para El Comercio, 462 U.S. 611 (1983)	31
French v. Banco Nacional de Cuba, 242 N.E.2d 704 (1968)	34
J. Zeevi & Sons, Ltd. v. Grindlays Bank, 333 N.E.2d 168 (Ct.App.N.Y. 1975)	34
Landreth v. Landreth, 105 S.Ct. 2297 (1985)	4, 15
Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870 (S.D.N.Y. 1983)	33, 34

Marine Bank v. Weaver,
455 U.S. 551 (1982) 10-14

McDonald, Sommer & Frates v. Yolo
County, 106 S.Ct. 2561 (1986) 25

Menendez v. Saks, 495 F.2d 1355
(CA2 1973); rev'd on other grounds
sub. nom Dunhill, 425 U.S. 682 34

Paulsen v. Commissioner of Internal
Revenue, 469 U.S. 131 (1985) 15

Ramirez de Arellano v. Weinberger,
745 F.2d 1500 (CADC 1984); remanded
due to intervening legislation,
105 S.Ct. 2353 30

Randall v. Loftsgaarden,
106 S.Ct. 3143 (1986) 8

S.E.C. v. Chinese Benevolent Ass'n,
120 F.2d 738 (CA2 1941) 5, 6

S.E.C. v. C.M. Joiner Leasing
Corp., 320 U.S. 344 (1943) 15

S.E.C. v. First American Bank &
Trust Co., 481 F.2d 673 (CA8 1973) 10

S.E.C. v. Liberty Loan Corp.,
9 SEC Docket 446 (1976) 10

S.E.C. v. Maxwell E. Meek,
22 SEC Docket 388 (1981) 10

S.E.C. v. W.J. Howey Co.,
328 U.S. 293 (1946) 15

Securities Industry Ass'n v. Board
of Governors, Federal Reserve
System, 468 U.S. 207 (1984) 5, 15

Tcherepnin v. Knight,
389 U.S. 332 (1967) 15

United States v. General Motors, 323 U.S. 373 (1945) 25, 26

STATUTES

Foreign Assistance Act (includes "Hickenlooper") 22 U.S.C. §2370(e)(1) and (2) 18, 28-31, 39

22 U.S.C. §§283r., 285o., 290g-8 37

Foreign Sovereign Immunities Act, 28 U.S.C. §§1605(a)(2) and (3) 1, 18

International Banking Act of 1978, 12 U.S.C. §§3102 et seq. 16, 17, 39

Investment Company Act 14

Securities Act of 1933, 15 U.S.C. §§77 et seq. 1, 3-6, 39

Securities Exchange Act of 1934, 15 U.S.C. §78(c)(a)(10) 11

56 Stat. 1347 20

OTHER AUTHORITIES

Articles of Agreement of the International Monetary Fund 35-37

Christie, XXXVIII Brit. Y. B. Int'l Law, 337-338 (1962) 26-27

17 C.F.R. §229.20, item 11, inst. 10 7

77 Cong. Rec. 2610, 2611 (1933) 7

Constitution of the United States, Art. I, Sec. 8, Cl. 10 31

1978 Digest of U.S. Practice in Int'l Law 1226-7 37

Foreign Claims Settlement Commission of the United States, Decisions and Annotations, pp. 343, 406 27

H. R. 97-626 (reprinted 1982 U.S. Code Cong. & Adm. News, 2781; 2788) 6, 14

Mann, The Legal Aspect of Money 3d Ed., p. 434 35

Mann, The Legal Aspect of Money 4th Ed., pp. 428, 429, 431; 472 19, 35

Restatement of the Law of Foreign Relations, §§186, 188; 712 20, 38

Securities Act Release No. 5739, September 7, 1976 8, 9

S. R. 95-1073 (reprinted 1978 U.S. Code Cong. & Adm. News 1422, 1429, 1433) 17

U. S. Department of State Press Releases, Vol. 19, pp. 50, 51; 139-141 (1938)(Hull Notes) 20, 21

15 Virginia Journal of International Law, pp. 372-373 34

Wortley, Expropriation in Public International Law (1959), p. 108 28

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reproduced in the appendix, page 1 . The unreported order of the district court for the Northern District of California is reproduced in the appendix, page 47.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry was January 6, 1987. A timely petition for rehearing en banc was denied March 10, 1987; the order denying rehearing is reproduced in the appendix, page 50.

The statute conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Securities Act of 1933, 15 U.S.C. §77 et seq., appendix, page 52.

Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611, appendix, page 55.

Foreign Assistance Act, 22 U.S.C. §2370(e)(1) and (2), appendix, page 59.

STATEMENT OF THE CASE

The bases for federal jurisdiction in the district court were the Securities Act of 1933, 15 U.S.C. §§77 l(1), (2), and v; and the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq.

Beginning in the late 70's and continuing thereafter, respondent Mexican banks advertised in the United States and otherwise solicited American citizens and residents to invest U.S. dollars in both peso and dollar denominated fixed term bank accounts in Mexico. The banks promised particularly high interest yields on peso accounts, payable in dollars at the depositors' option, and the reconversion to dollars upon maturity. Promising competitive yields on dollar accounts, the banks guaranteed the payment of interest and return of principal in dollars; checks drawn upon United States banks were used to make all such payments.

Relying upon such information, petitioners, American citizens and residents, invested U.S. dollars by mail in the respondent Mexican banks and received in return uninsured, nonwithdrawable deposit receipts.

On February 17, 1982 Mexico's central bank abruptly ceased its intervention in the Mexican money market and the exchange value of the peso began plummeting; petitioners whose peso accounts matured thereafter were repaid far less upon reconversion of those accounts to dollars than the sums they had originally invested and notwithstanding the supposedly high interest yields.

On September 1, 1982 all Mexican banks including respondents were nationalized and a decree was issued that "Upon maturity, all bank deposits in foreign currency will be eliminated, and will be repaid at the rate of exchange set by the Banco de Mexico." The rate set was 70 pesos per dollar, whereas the prevailing rate of exchange, in

Mexico and worldwide, was invariably greater and as of this writing is more than 1,100 to 1. Thus, petitioners with dollar accounts suffered devastating losses.

The depositors instituted class actions claiming the banks had sold them unregistered securities in violation of the Securities Act of 1933, 15 U.S.C. §77 1(1), and had omitted material information in their offerings misleading the depositors in further violation of §77 1(2) of that Act. The dollar depositors also claimed their rights in property were taken in violation of international law because they were repaid in pesos at substantially less than the prevailing rate of exchange.

The district court entered summary judgment in favor of the Mexican banks and the court of appeals affirmed, holding the deposit instruments were not securities and the deposits were not taken in violation of international law.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION OF INTERNATIONAL IMPORTANCE IN A MANNER CONTRARY TO THE PLAIN LANGUAGE AND OBVIOUS PURPOSES OF THE SECURITIES ACT OF 1933.

Deposit instruments of foreign banks are both "evidence[s] of indebtedness" and "receipt[s] [there]for", each of which is included within the definitions of a security in the Securities Act of 1933 at 15 U.S.C. §77 (b)(1). Although literal inclusion has not necessarily been determinitive, it was recently held to be. Landreth v. Landreth, 105 S.Ct. 2297 (1985) declares,

> We here expressly leave until another day the question whether "notes" or "bonds" or some other category of instrument listed in the definition might be shown by proving the document itself ... We hold only that "stock" may be viewed as being in a category by itself for purposes of interpreting the scope of the Act's definition of "security".

See also, Securities Industry Association

v. Board of Governors, Federal Reserve System, 468 U.S. 207 (1984),

> Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act ...

15 U.S.C. §77 c(a)(2) specifically exempts from the provisions of the Act securities issued or guaranteed by domestic banks:

> the term "bank" means any national bank, or any banking institution organized under the laws of any State.

The Act provides no exemption whatsoever for securities issued or guaranteed by foreign banks. As this Court noted in Securities Industry Ass'n, supra,

> ... each [securities] statute contains explicit exceptions when Congress meant for the provisions of an act not to apply ...

The Act has always applied to the securities of foreign governments, 15 U.S.C. §77 f(a), j(a)(2); see also, S.E.C. v. Chinese Bene-

volent Ass'n, 120 F.2d 738 (CA2 1941),

> the provisions for registration statements apply to issues of securities by a foreign government [cit.om.].

Suddenly to exempt the deposit instruments of foreign banks wholly owned by foreign governments from the registration provisions of the Act is also contrary to the 1982 amendments to the definitional section of the Act. Finding that,

> Financial instruments designed to speculate on, or hedge against, fluctuations in interest rates and exchange rates, as well as stock market movements and other economic changes have proliferated (emphasis added),

H.R. 97-626, reprinted at 1982 U.S. Code Cong. & Adm. News 2781, Congress added to the definitions of a security:

> any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency (emphasis added).

15 U.S.C. §77 b(1). The peso-denominated deposit instruments at issue here (as wellas the dollar-denominated instruments that were involuntarily converted to peso instruments)

were indeed "financial instruments designed to speculate on ... fluctuations in ... exchange rates" as well as "option[s] ... relating to foreign currency". Because the depositor could neither use, spend, borrow nor convert his deposit prior to maturity, all he had was an option to take possession, or sell a certain number of pesos at the rate of exchange prevailing on some future date. The depositor became a speculator in foreign currency, but without the kind of information the securities laws demand he be given; see, e.g., 17 C.F.R. §229.20, item 11, instruction 10.

What the Act provides is utterly clear; that its purpose was to protect the American public from the gigantic investment abuses to which it had been subjected by banks and corporations alike, both foreign and domestic, is equally clear; see, e.g., 77 Cong. Rec. 2610, 2611 (1933).

As this Court found in Randall v. Loftsgaarden, 106 S.Ct. 3143 (1986),

> But the 1933 Act is intended to do more than ensure that defrauded investors will be compensated: the Act also "aim[s] ... to prevent further exploitation of the public ... [and] to place adequate and true information before the investor. [cit. om.]

The decision below ignores those concerns; it also ignores the well established construction given the Act by the Securities and Exchange Commission.

AS THE SINGLE AGENCY CREATED AND ENTRUSTED BY CONGRESS TO ADMINISTER THE FEDERAL SECURITIES LAWS, THE SECURITIES AND EXCHANGE COMMISSION LONG AGO DETERMINED THAT THE DEPOSIT INSTRUMENTS OF MEXICAN BANKS WERE SECURITIES WITHIN THE MEANING OF THE ACT.

Securities Act Release No. 5739, September 7, 1976; 10 SEC Docket 406, declares:

> The Securities and Exchange Commission announced today that the SEC and Mexican financial authorities have reached an accord with respect to joint efforts by the SEC and the Mexican authorities to achieve compliance with the U.S.

and Mexican securities laws.

> In Securities Act Release No. 5698 (April 5, 1976), the SEC placed on the Foreign Restricted List the names of the following Mexican Financial institutions ("financiaras"): Credito Minero y Mercantil, S.A.; Financiera de Fomento Industrial, S.A.; Financiera Comermex, S.A. [Multibanco Comermex -- one of the respondents herein]; and Financiera Metropolitana, S.A. The SEC took the action when it received information that investors in the United States were being solicited to purchase and were purchasing promissory notes, certificates of deposit and other securities of the four financieras for which no registration statement had been filed pursuant to the provisions of the Securities Act of 1933 ("Securities Act"). Promissory notes, certificates of deposit and other securities of the financieras are securities under Section 2(1) of the Securities Act, and no exemption from registration is available with respect to such securities...

Obviously the accord was simply ignored by Mexico and its respondent banks.

It has also been the unqualified and long-standing position of the Securities and Exchange Commission that certificates of deposit and similar instruments issued by banking organizations that are not subject to domestic bank regulation are securities.

See, e.g., SEC v. Maxwell E. Meek, Civ. Act. No. 81-227-T (W.D. Okla.), Litigation Release No. 9307, March 3, 1981, 22 SEC Docket 388; SEC v. Liberty Loan Corp., Civ. Act. No. 76-304c (E.D. Mo.), Litigation Release No. 7356, April 13, 1976, 9 SEC Docket 446; SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8 1973). "... that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" has long been recognized by this Court, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Notwithstanding the plain language, obvious purposes, and specific interpretation of the Act by the SEC demanding that the deposit instruments at issue be held securities, the Ninth Circuit held they were not because of its misplaced reliance upon Marine Bank v. Weaver, 455 U.S. 551 (1982).

IN NO WAY DOES MARINE BANK v. WEAVER SUPPORT THE DECISION BELOW; ITS HOLDING IS INAPPOSITE.

Marine Bank v. Weaver held that an ordinary certificate of deposit, issued by a federally regulated domestic bank, and insured against loss by the Federal Deposit Insurance Corporation, was not a security for purposes of the antifraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78(c)(a)(10),

> This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation ... We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency... It is unnecessary to subject issuers of bank

> certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. 455 U.S. 558.

The deposit instruments here were not issued by a federally regulated bank; the deposits were not insured by the FDIC nor by anyone else; the depositors did assume the risk of the borrowers' insolvency, were never guaranteed repayment in full; and, lacking any protection whatsoever under the federal banking laws, lost most of their deposits. Ignoring those realities, the court of appeals opined that the mere existence of Mexican bank regulation virtually guaranteed the depositors repayment in full to the same extent as depositors in U.S. banks, and concluded therefore that Marine Bank v. Weaver required it to hold that the deposit instruments at issue were not securities.

Fundamentally, neither the existence nor even the apparent adequacy of Mexican bank

regulation can ever protect an American depositor from the risks associated with devaluation and the imposition of exchange control regulations that severely diminish the value of the deposits. Such risks are never addressed by bank regulation but are risks the securities laws would require these foreign banks to specifically disclose, particularly describe, and otherwise warn investors about the dangers of.

Moreover, Marine Bank v. Weaver did conclude,

> It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. 455 U.S. 560, note 11.

Analysis and evaluation of the transactions at issue clearly reveals they were part and parcel of an international investment scheme, designed and promoted by the securities departments of respondent banks, directed at

literally millions of American offerees, specifically to attract the investment of their dollars across the border. To exempt the otherwise unregulated deposit instruments from the requirements of the federal securities laws is entirely inconsistent with Marine Bank v. Weaver.

The 1982 Congress recognized that case was confined to its own facts, that its key was domestic regulation, and that as a matter of law domestic certificates of deposit were still considered securities under the Investment Company Act; H.R. 97-626, reprinted at 1982 U.S. Code Cong. & Adm. News, 2788. Not only can the pretended safety allegedly provided by foreign bank regulation never be a valid substitute for the domestic regulation and everyday supervision of a bank and its instruments by agencies and pursuant to laws created by Congress that Marine Bank v. Weaver said made application of the securities laws there superfluous, it is

entirely irrelevant; see, Securities Industry Ass'n v. Board of Governors, supra,

> We do not doubt that the risk of default with commercial paper is relatively low - lower perhaps than with many bank loans ... however we find reliance on this characteristic misplaced ... there is little evidence to suggest that Congress intended the [Glass-Steagall] Act's prohibitions on underwriting to depend on the safety of particular securities ...

The judgment below is contrary to and inconsistent with other decisions of this Court.

PRINCIPLES HELD DETERMINITIVE BY THIS COURT ESTABLISH THAT ANY INSTRUMENT, TAKING TRADITIONAL FORMS OR NOT, WHEN OFFERED TO THE GENERAL PUBLIC AS AN ATTRACTIVE INVESTMENT AND NOT SPECIFICALLY EXEMPT, IS A SECURITY FOR PURPOSES OF THE FEDERAL SECURITIES LAWS.

See, e.g., SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); Tcherepnin v. Knight, 389 U.S. 332 (1967). See also, Landreth v. Landreth, supra; Paulsen v. Commissioner of Internal Revenue, 469 U.S. 131 (1985).

THE DOMESTIC MARKETING AND SALES OF FOREIGN BANK DEPOSIT INSTRUMENTS THROUGH THE MAILS VIOLATES THE INTERNATIONAL BANKING ACT.

The International Banking Act of 1978, 12 U.S.C. §§3102, et seq., governs foreign bank participation in the domestic market by providing for the establishment here of regulated branches of foreign banks desirous of conducting legitimate banking business with United States' citizens and residents. In particular, the Act requires that such banks must comply with the reserve, reporting, inspection, advertising, and all other regulations imposed upon domestic banks, 12 U.S.C. §3102(b), subject themselves to domestic bank rules of insolvency, 12 U.S.C. §3102(j)(1), and offer deposit insurance, 12 U.S.C. §3104.

Obviously, were the reserve, reporting, inspection and advertising requirements imposed upon foreign banks in their countries of origin deemed adequate by Congress for

the protection of American depositors, there would have been no need for this legislation; or, Congress could have provided an exemption for "well-regulated" foreign banks. Instead, it found that domestic supervision and control even over the operations of large, world-wide and otherwise well-regulated foreign banks was essential to the protection of American interests; S.R. 95-1073, reprinted 1978 U.S. Code Cong. & Adm. News pp. 1422, 1429, 1433.

Permitting foreign banks to evade this Act by deliberately failing to establish branches here while continuing to advertise, solicit, and accept deposits by mail, and at the same time escape registration of their deposit instruments under the securities laws because the banks are presumably well-regulated, is doubly repugnant to the will of Congress and must not be permitted to continue. These considerations alone demand review and reversal of the judgment below.

A SOVEREIGN STATE'S ELIMINATION BY DECREE OF THE BANK DEPOSITS OF AN ALIEN WITHOUT PAYMENT OF FULL COMPENSATION IS A TAKING IN VIOLATION OF INTERNATIONAL LAW.

Because the dollar deposits were involuntarily converted to pesos at far below the prevailing rates of exchange, there was not payment of full compensation here. Having first determined respondent banks were not entitled to sovereign immunity because of their commercial activities in the United States (28 U.S.C. §1605(a)(2)), the court of appeals next found they lacked sovereign immunity because rights in property taken in violation of international law were in issue (28 U.S.C. §1605(a)(3)). The court then held that Hickenlooper (22 U.S.C. §2370(e)(1) and (2)) precluded application of the act of state doctrine because the deposit instruments were property interests protected under international law, app'x, pp. 33-35. But it ruled no taking

in violation of international law had occurred because "Mexico's institution of exchange controls was an exercise of its basic authority to regulate its economic affairs." The court of appeals misses the point. As Professor Mann states, The Legal Aspect of Money, 4th Ed., at 472,

> The fact that the regulation of its currency falls within the State's sovereign jurisdiction does not mean that it is withdrawn from any control by international law.

It is precisely because the exercise of sovereign power sometimes infringes upon the rights of aliens that compensation becomes appropriate under international law. Indeed, a taking in violation of international law occurs when the exercise of sovereign power interferes significantly with the property or economic rights of an alien, and the state does not compensate him adequately for those rights -- exactly what happened here. The Restatement of

Foreign Relations Law 2d, §186 provides,

> Failure of a state to pay just compensation for taking the property of an alien is wrongful under international law regardless of whether the taking itself was wrongful under international law.

§188 continues,

> ... Under ordinary conditions ... the amount [of compensation] must be equivalent to the full value of the property taken ...

Nearly 50 years ago the United States and Mexico debated and determined that Mexico's taking of American citizens' property rights without the payment of adequate compensation was a taking in violation of international law and payment was made (see 56 Stat. 1347), despite the acknowledged exercise of Mexico's sovereign power to institute agrarian reform.

> The issue is not whether Mexico should pursue social and economic policies designed to improve the standard of living of its people. The issue is whether in pursuing them the property of American nationals may be taken by the Mexican Government without making prompt payment of just compensation to the owner in accordance with the universally recognized rules of law and equity ...

> The taking of property without compensation is not expropriation. It is confiscation ...

Note, the Honorable Cordell Hull, Secretary of State, to the Mexican Ambassador, July 21, 1938; 19 U.S. Dept. of State Press Releases, pages 50, 51.

> There is, indeed, no mystery about international law. It is nothing more than the recognition between nations of the rules of right and fair-dealing, such as ordinarily obtain between individuals, and which are essential for friendly intercourse ...
>
> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations ...

Id., August 22, 1938, pages 139-141.

The court of appeals fixation on the word

"taking" in order to find that none had occurred is equally misplaced. In Allied Bank v. Banco Credito Agricola, 757 F.2d 516 (CA2 1985) the Second Circuit held that Costa Rica's imposition of currency control decrees (to regulate its economic affairs) that prevented its state-owned banks from repaying Allied pursuant to a loan agreement was insufficient as a matter of law to excuse the debt and ordered repayment in full:

> It seems clear that if the decrees are given effect and Allied's right to receive repayment in accordance with the agreement is thereby extinguished, a "taking" has occurred. (note 3)
>
> The property, of course, is Allied's right to receive repayment from the Costa Rican banks in accordance with the agreements.
>
> ... while Costa Rica has a legitimate concern in overseeing the debt situation of state-owned banks and in maintaining a stable economy, its interest in the contracts at issue is essentially limited to the extent to which it can unilaterally alter the payment terms ...
>
> The Costa Rican's government's unilateral attempt to repudiate private, commercial obligations is inconsistent with the orderly resolution of inter-

national debt problems. It is similarly contrary to the interests of the United States. [emphasis added]

As Allied pointed out, the Justice Department fully supported its holding. Giving controlling effect to Mexico's confiscatory exchange control regulations in United States courts conflicts with the international system of finance and its continued efficacy. International loan agreements, of which dollar deposits abroad are a significant part, must remain enforceable if world trade, commerce, and investment are to continue. Obviously, the unilateral repudiation of such agreements by the debtor bank or nation must be discouraged if further international lending is to continue. Inasmuch as the majority of the financing of developing nations is provided by the private commercial sector, its continuation is critical in alleviating the financial burdens of heavily indebted nations. The individual American or corporate citizen who loans or deposits

dollars abroad in good faith is legally entitled to no less protection from our legal system than the commercial bank that does so. Central to this theme, it has been the official position of the United States Government for at least the past forty years to encourage and support the restructuring and rescheduling of international indebtedness of financially troubled nations in sharp and distinct contrast to condoning the repudiation of such indebtedness. It is consistent therewith, and indeed civilized order demands, that unless a creditor public or private consents, his right to repayment in full must remain inviolate. This process of voluntary accommodation is impaired by judicial recognition of the unilateral repudiation of any international debt. The judicial recognition below of Mexico's unilateral repudiation of the private commercial obligations of respondent banks is repugnant to the entire system of international fin-

ance; and, unless reviewed, will undermine that system. Such recognition is also repugnant to the legal concepts of debt, bargain and contract long recognized throughout the civilized world.

McDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561 (1986) recently recognized that regulations may constitute takings for Fifth and Fourteenth Amendment purposes if they go too far.

> Our cases have accordingly examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors - such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action - that have particular significance.

Earlier, United States v. General Motors, 323 U.S. 373 (1945) explained,

> The critical terms are "property," "taken" and "just compensation" ... Property ... denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it ... deprivation of the former owner rather than the accretion of a

> right or interest to the sovereign constitutes the taking ... compensation to be paid is the value of the interest taken ... the owner must be put in as good position pecuniarily as if his property had not been taken ...

Here, there can be no question that the elimination of the dollar deposits, the actual retention of those deposits by the respondent banks, and their failure to pay the prevailing rates of exchange, so depleted the depositors' funds, and so diminished the use, possession and enjoyment thereof, that a taking most surely occurred.

The so-called commentators to the contrary cited by the court of appeals do not support its conclusion. Professor Christie, XXXVIII Brit. Y. B. Int'l Law, 337-8 (1962) wrote,

> Although most interference with property, particularly if it is general in nature, can be clothed under the rubric of some recognized social purpose, the cases have clearly indicated that a State's mere declaration that expropriation is not intended is not determinitive of the issue ...
>
> When coupled with other interferences with the use of property, however, the

> refusal to permit transfer of funds abroad is a relevant factor in determining whether expropriation has occurred from the combined effect of all the interference imposed on an alien's use of his property ...
>
> Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensatable claim arises ...

The Foreign Claims Settlement Commission of the United States, Decisions and Annotations pp. 343, 406, considered very similar cases:

> The Commission found that ... on December 28, 1917 such severe restrictions were imposed upon withdrawals from bank accounts as to prevent depositors residing outside of Russia and holders of large deposits in general from withdrawing funds. This action was deemed to be a taking of the bank accounts on December 28, 1917 and was the basis for awards. (Claim of Allis-Chalmers Manufacturing Company, Claim No. SOV-41857, Dec. No. SOV-2476, 10 FCSC Semiann. Rep. 209 (Jan.-June 1959).)
>
> In 1947 all such accounts [in old Koruna deposits in Czechoslovakia] were transferred to a special Currency Liquidation Fund, and were annulled ... The Commission held ... that the annulment ... of all bank accounts ... was a taking of property ... (Claim of John Stipkala, Claim No. CZ-1616, Dec. No. CZ-135, 17 FCSC Semiann. Rep. 191 (July-Dec. 1962).

Wortley, Expropriation in Public International Law (1959), p. 108 observes,

> *Although persons using foreign money* may be taken to risk market fluctuations in its value, there is no reason why they should be presumed to have agreed to allow themselves to be expropriated by the results of foreign exchange control or currency legislation.

Indeed, when, as here, the depositors were specifically and unconditionally guaranteed repayment of their deposits in U.S. dollars, no risk whatsoever that those deposits might instead be taken may be presumed. More important, the repudiation of those deposit agreements unaccompanied by the payment of full compensation itself constitutes a violation of international law.

CONGRESS HAS DECLARED THAT PRINCIPLES OF INTERNATIONAL LAW REQUIRE THE PAYMENT OF FULL COMPENSATION FOR A FOREIGN STATE'S REPUDIATION OF CONTRACTS OR NULLIFICATION OF AGREEMENTS WITH A UNITED STATES CITIZEN.

The Foreign Assistance Act, 22 U.S.C. §2370 (e)(1) provides,

> The President shall suspend assistance to the government of any other country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country ...
>
> (A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen ... or
>
> (B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen ...
>
> (C) ... or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,
>
> and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action ...) to take appropriate steps ... to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law ... (emphasis added).

The Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. §2370(e)(2) abolishes the act of state defense in actions by a United States citizen seeking enforce-

ment of his rights to full compensation under international law. As Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1541 (CADC 1984)(en banc); remanded due to intervening legislation, 105 S.Ct. 2353 held,

> The statutory standards which the foreign state must meet - before a court may apply the act of state doctrine - include speedy compensation equivalent to the full value of the confiscated economic interest. (emphasis in original).

Although the court of appeals found the act of state doctrine inapplicable, it failed to recognize that the plain language of the Act clearly would include the taking of "steps to repudiate or nullify existing contracts or agreements with any United States citizen", i.e. repudiation of the dollar deposit agreements, without payment of "compensation for such property in convertible foreign exchange [pesos], equivalent to the full value thereof, as required by international law", as violations of international law or as takings in violation

thereof. The whole tenor of the Act makes that clear. Congress, of course, has the Constitutional power to define principles of international law; see, Art. I, Sec. 8, Cl. 10, United States Constitution; see also, First National City Bank v. Banco Para El Comercio, 462 U.S. 611 (1983) confirming such Conressional authority. The court of appeals was no more free to ignore those principles than it was free to ignore an opinion of this Court.

THIS COURT HAS DECIDED THAT A FOREIGN STATE'S REPUDIATION OF A PURELY COMMERCIAL OBLIGATION IS NEITHER AN IMMUNE ACT OF STATE NOR SUBJECT TO A CLAIM OF SOVEREIGN IMMUNITY; IT IS THEREFORE COMPENSABLE.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) declared:

> ... the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.

> Repudiation of a commercial debt cannot, consistent with the restrictive approach to sovereign immunity, be treated as an act of state; for it it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our Government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible.
>
> For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity." (plurality opinion).

The court of appeals held (app'x pp. 15-16),

> Here, as in Callejo, the defendants engaged in a regular course of commercial conduct in the United States and it was certainly forseeable at the time of the solicitations that their commercial activities would subject them to suit. Moreover, that defendants were "prevented from complying with [their] contract[s] by a governmental decree flatly prohibiting the use of dollars as legal tender does not make [them] immune from suit as an agent of the Republic of Mexico"

> acting in a sovereign capacity. Braka, 589 F.Supp. at 1470. See also Callejo, 764 F.2d at 1110 ("In the present case, Bancomer did not act as an agent of the Mexican Government in implementing the exchange regulations; instead, it acted as any private party would in complying with the law."); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985) ("[A]lthough the promulgation of the exchange regulations ... was a sovereign act ... the relevant acts of the defendant [in Callejo] consisted merely of selling and later breaching the certificates.").

The purely commercial acts of the respondent banks consisted merely of selling and later breaching the certificates of deposit; absent immunity and lacking any other defense, liability for those breaches must surely follow. In Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870 (SDNY 1983), a consortium of mostly foreign banks prevailed in a suit to recover a 40 million dollar loan to a Costa Rican bank; the defense was that Costa Rica's currency control regulations effectively prevented repayment.

> The property in question in this case is plaintiffs' legal right to repayment

> of the debt owed by the defendant. The Costa Rican decrees purport to alter the legal relations of the parties because they attempt to extinguish plaintiffs' rights ... [D]efendant has submitted no authority for its view that a contract, valid and enforceable when made, may be rendered unenforceable by an intervening currency regulation. Indeed, there is authority in support of the contrary view [cits. om.].

Similarly, J. Zeevi & Sons, Ltd. v. Grindlays Bank, 333 N.E.2d 168 (N.Y.Ct.App. 1975), ignored its earlier 4-3 opinion in French v. Banco Nacional de Cuba, 242 N.E.2d 704 (1968) and ordered enforced a Grindlays Bank letter of credit invalidated by a currency regulation.

UNDER UNIVERSALLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW, NEITHER THE REVENUE LAWS NOR THE EXCHANGE CONTROL REGULATIONS OF ONE FOREIGN STATE ARE ENFORCEABLE IN ANOTHER.

Banco Do Brazil v. Israel Com. Co., 139 N. Y.S.2d 872 (1963); Menendez v. Saks, 485 F.2d 1355, 1366, (CA2 1973); rev'd on other grounds sub. nom. Dunhill, supra; 15 Va.J. Int'l Law 372; Banco Nacional de Cuba v. Sab-

batino, 376 U.S. 398, 413, 414 (1964); Mann, The Legal Aspect of Money, 4th Ed., 428-9. As Professor Mann has written, even where (as here) such regulations are presented as a "defence", they ought to fail; Id. at 431. Consistent therewith, the Articles of Agreement of the International Monetary Fund do not require "recognition and enforcement of exchange control legislation among members", Mann, The Legal Aspect of Money, 3d Ed., 434. Violation of the Argeement, on the other hand, may "require the rejection of a foreign State's exchange restrictions", Id.

MEXICO'S EXCHANGE CONTROL REGULATIONS VIOLATED THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND.

The Agreement provides that members shall not "impose restrictions on the making of payments and transfers for current international transactions", Art. VIII, Sec. 2 (a), which includes "normal short-term

banking", Art. XIX(i); nor "engage in ... any discriminatory currency arrangements or multiple currency practices ...", Art. VIII, Sec. 3. Clearly, the principal payments that were due upon maturity of the dollar accounts were payments for current international transactions, e.g., short-term banking. Those payments were not merely restricted, they were "eliminated". Thus, the regulations violated Art. VIII §2(a). The 70 peso rate of exchange at which the dollar deposits were involuntarily converted was always alarmingly less than the prevailing rate of exchange in Mexico and world-wide; that was both a discriminatory currency arrangement and a multiple currency practice in separate violation of Art. VIII, §3. Those violations are additional reasons why the regulations must be rejected as a defense in the cases at bar.

When the legal director of the International Monetary Fund indicated in another case

that Mexico's regulations did not violate the fund Agreement, he was referring to those particular regulations that Mexico enacted August 12, 1982 and repealed September 1, 1982 requiring conversion of foreign currency deposits at the prevailing rates of exchange. He was not referring to the regulations at issue requiring conversion at the fixed rate of 70 pesos per dollar no matter what the prevailing rate might be. That is a part of the record in this case. Any of Mexico's legitimate goals could have been accomplished by the payment of fair value for the dollar deposits.

CONCLUSION

It is essential for the courts to recognize what the Executive Branch and the Congress have both acknowledged, see, e.g., 1978 Digest of U.S. Practice in Int'l Law 1226-7; 22 U.S.C. §283r., §285o., §290g-8: In addition to those acts that historically have

constituted takings in violation of international law, other fully developed principles of international law require the payment of full compensation for actions that have the same effect as a taking; and, more specifically, require the payment of full compensation for "a repudiation or breach by the state of a contract with a national of another state", ALI Restatement of the Law of Foreign Relations §712 (Tent. Draft No. 7; April 10, 1986); see also, Alfred Dunhill of London v. Republic of Cuba, supra. Surely application of accepted principles of international law cannot turn on the identity of the foreign state charged with their violation.

The class actions at bar will finally determine whether the many thousands of United States citizens who lost many millions of dollars are entitled to the protections guaranteed them by international law and by no fewer than three Congressional Acts --

Securities Act of 1933, the International Banking Act, and the Foreign Assistance Act -- they will determine as well whether or not other foreign banks and states are now free to engage in similar acts causing similar losses with absolute impunity. Almost every bank on earth is "well-regulated"; certainly every state's exchange control decrees are adopted "to regulate its economic affairs"; whether or not such "considerations" alone are truly sufficient to nullify protections otherwise guaranteed to its citizens by this nation of laws is a question that deserves to be settled by this Court. For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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